Supreme Court, U.S.
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No. 97-1230

In The

SUPREME COURT OF THE UNITED STATES
October Term, 1998

CITY OF WEST COVINA,
Petitioner,

vs.

LAWRENCE PERKINS; CLARA PERKINS;
APRIL PERKINS, a minor, by and through
LAWRENCE PERKINS,
Respondents.

On Writ Of Certiorari To The United States
Court Of Appeals For The Ninth Circuit

PETITIONER'S REPLY TO RESPONDENTS' BRIEF ON THE MERITS

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INTRODUCTION

The crux of respondents' argument is the assertion that the City deprived them of the "information necessary to implement the procedure for return of property, and therefore, rendered the process meaningless." (Resp. Brief at 9.) Specifically, respondents contend that but for the City's failure "to leave a copy of the search warrant (which includes the identifying search warrant number)," it is "likely that respondents would have been able to retrieve their property under the appropriate procedures." (Resp. Brief at 1, 11, 32, 38.) Respondents' argument lacks both factual and legal support.

Factually, respondents rely exclusively on their claim that they *did not* get the property back as evidence that they *could not* get the property back. However, the record is devoid of any evidence to support respondents' contention that a search warrant number was required to invoke the process. Rather, the evidence demonstrates that at most, Mr. Perkins "made one trip to the Municipal Court, was advised that there was no file in his name and ceased any efforts to obtain an order returning his property." (Pet.App. E7.)

Legally, respondents rely on Federal Rule of Criminal Procedure 41(d) and two condemnation cases for the proposition that the Due Process Clause imposes a duty to provide "notice" of some sort even where notice and a hearing prior to the deprivation are not required. Rule 41(d), however, is grounded in the Fourth Amendment, not the Due Process Clause. While notice of the search, the authority for the search and the identity of any items seized seem reasonable under the Fourth Amendment, a separate notice under the Due Process Clause is unnecessary and unsupported by precedent.

Equally unpersuasive is respondents' reliance on two condemnation cases, *Bragg v. Weaver*, 251 U.S. 57 (1919) and *Schroeder v. City of New York*, 371 U.S. 208 (1962) as purported examples of postdeprivation cases which require notice. Both cases arose in the condemnation context where the notices at issue were of an impending hearing or deadline which would work forfeitures of the claimants' rights in the absence of some affirmative action by the claimants. Therefore, notice was required in *Bragg* and *Schroeder*, not to inform the claimants of the existence of a postdeprivation "remedy", but to provide them with the opportunity to appear and be heard at a proceeding where the amount of compensation would be finally adjudicated. Consequently, *Bragg* and *Schroeder* have little application to the instant case.

Without citing to any legal authority, respondents complain that simply notifying them that property was seized from their residence pursuant to a court-issued warrant was insufficient for purposes of the Due Process Clause. In urging this Court to ignore its prior holdings, respondents contend that due process is not satisfied in postdeprivation cases even where the State provides adequate post-deprivation remedies for the return of seized property. *See Parratt v. Taylor*, 451 U.S. 527, 544 (1981) and *Hudson v. Palmer*, 468 U.S. 517 (1984). According to respondents, due process also requires the State to provide adequate notice to potential claimants of their legal remedies and the procedures for invoking them (i.e., "key information" and "basic directions" as to what course to take to retrieve their property.) (Resp. Brief at 26.) This is the type of constitutionalization of state law by the creation of additional "due process" rights that this Court has warned against. (*See, Graham v. Connor*, 490 U.S. 386, 394-395 (1989) and *Albright v. Oliver*, 510 U.S. 266, 273-74 (1994).)

Finally, if this Court determines that the Due Process Clause requires some form of notice even in postdeprivation cases such as the instant action, the notice requirement should be limited to notice of the actual seizure of property pursuant to a court issued warrant.

Simply stated, where a public agency is not required to provide a hearing prior to the seizure of a property interest, procedural due process is satisfied as long as the State provides adequate postdeprivation judicial remedies to the claimant. The adequacy of the state remedy does not turn on whether the State provides notice of the availability of a judicial remedy and guidance for invoking that remedy.

ARGUMENT

I. RESPONDENTS' RELIANCE ON FEDERAL RULE OF CRIMINAL PROCEDURE 41(d) AND TWO CONDEMNATION CASES FOR THE PROPOSITION THAT DUE PROCESS REQUIRES "NOTICE" IN A POST-DEPRIVATION CASE IS MISPLACED

A. Rule 41(d) Arises From The Fourth Amendment, Not The Due Process Clause

Without any citation to legal precedent, respondents assert that "[n]otice is a fundamental component of due process regardless of when the hearing occurs." (Resp. Brief at. 12.) Instead of citing precedent, respondents simply state that "[t]he United States agrees." (Id.) The amicus brief filed on behalf of the United States assumes that due process imposes a requirement of "individualized notice that property has been seized." The cited authority is Federal Rule of Criminal Procedure 41(d) and the history and practice of a majority of the States. Nothing in the history of Rule 41(d), however, suggests that it has

its roots in due process law. Rather, the history of Rule 41(d) makes clear that it is a creature of the Fourth Amendment.

The City agrees that under the circumstances of the instant case, it has a duty of providing "individualized notice that a law enforcement agency has seized identified property pursuant to a court-issued warrant." That duty, however, flows from the Fourth Amendment's proscription against unreasonable searches and seizures, not a notice component of procedural due process.[1]

There are few who could argue with the proposition that failing to leave any notification for an absent homeowner of a recently executed search could render an otherwise valid search unreasonable. Absent some notification as to who had entered the home and under what authority, the absent homeowner would be left to speculate that his home had been unlawfully entered and that his personal effects had been stolen. Indeed, in *Berger v. State of New York*, 388 U.S. 41, 60 (1967), this Court stated that the absence of any notice requirement in a New York statute authorizing warrants for wiretaps was one of the factors invalidating the statute under the Fourth Amendment.[2]

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[1] The Fourth Amendment to the Constitution of the United States of America provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

[2] Decisions of various circuit courts interpreting Rule 41 also demonstrate that it is grounded in the Fourth Amendment, not in the Due Process Clause of the Fourteenth Amendment. *See United States v. Pangburn*, 983 F.2d 449 (2nd Cir. 1993) (Rule 41 notice requirements analyzed in context of Fourth Amendment search and seizure principles); *United States v. Gervato*, 474 F.2d 40, 43-44 (3rd Cir. 1973) (Rule 41(d) analyzed in context of Fourth Amendment in determining whether warrant can be constitutionally executed in the known absence of the occupant where there are no exigent circumstances); *Navarro v. United States*, 400 F.2d 315, 318 (5th Cir. 1968) ("The purpose of Rule 41 is to carry out the mandate of the fourth amendment."); *United States v. Searp*, 586 F.2d 1117, 1121 (6th Cir. 1978) (recognizing that "the purpose of Rule 41 is the implementation of the fourth amendment..."); *United States v. Hepperle*, 810 F.2d 836, 838 (8th Cir. 1987) (noting that the "fourth amendment protects the right of the person to be free from unreasonable searches" and Rule 41 "outlines procedural requirements relating to search warrants").

The Ninth Circuit has recognized that Rule 41(d) is grounded in the Fourth Amendment. Specifically, in *United States v. Freitas*, 800 F.2d 1451 (9th Cir. 1986), the Ninth Circuit addressed whether a warrant which authorized the surreptitious entry into a home to obtain information regarding drug manufacturing violated the Fourth Amendment by failing to provide notice as required under Rule 41(d). Finding that the absence of notice violated the Fourth Amendment, the Ninth Circuit stated:

> The absence of a notice requirement in the warrant presents a much more difficult issue. While it is clear that the Fourth Amendment does not prohibit all surreptitious entries, *see Dalia v. United States*, 441 U.S. 238, 247, 99 S.Ct. 1682,1688, 60 L, Ed.2d 177 (1979), it is also clear that the absence of any notice requirement in the warrant casts strong doubt on its constitutional adequacy, *see Berger v. New York*, 388 U.S. 41, 60, 87 S.Ct. 1873, 1884, 18 L.Ed.2d 1040 (1967). We resolve those doubts by holding that in this case the warrant was constitutionally defective in failing to provide

explicitly for notice within a reasonable, but short, time subsequent to the surreptitious entry. Such time should not exceed seven days except upon a strong showing of necessity.

We take this position because **surreptitious searches and seizures of intangibles strike at the very heart of the interests protected by the Fourth Amendment.** The mere thought of strangers walking through and visually examining the center of our privacy interest, our home, arouses our passion for freedom as does nothing else. That passion, the true source of the Fourth Amendment, demands that surreptitious entries be closely circumscribed. The warrant in this case failed to do so.

Id. at 1456 (emphasis added).

In short, the authorities cited by respondents suggest, at most, that any notice requirement arises from the Fourth Amendment, not the Due Process Clause. See also *Graham v. Connor, supra*, 490 U.S. at 394 (if a constitutional claim is covered by a specific constitutional provision, the claim must be analyzed under the standard appropriate to that specific provision, not under substantive due process); *see also Albright v. Oliver, supra*, 510 U.S. 266 (substantive due process analysis is inappropriate if a plaintiff's claim is "covered by" the Fourth Amendment). The City suggests, therefore, that any required notice in the instant case be judged under the Fourth Amendment's reasonableness standard, not under the balancing test of *Matthews v. Eldridge*, 424 U.S. 319 (1976). Here, it is undisputed that the City's officers in this case left a form entitled "Search Warrant: Notice of Service" and receipt for property seized pursuant to the warrant. The notice identified the agency that performed the search, the date of the search and the identity of the

judicial officer who issued the warrant. Therefore, the City did what it was required to do for Section 1983 purposes – it notified the individuals whose residence was searched that government officials have seized identified property under the authority of a court-issued warrant.

B. Contrary To Respondents' Assertion, *Bragg v. Weaver* And *Schroeder v. City Of New York* Are Not True Postdeprivation Cases And Have Little Application To The Instant Case

Respondents cite only two cases for the proposition that notice of some sort has been previously recognized as a necessary element of due process where the State was not required to provide a hearing prior to the deprivation of a property interest. *Bragg v. Weaver*, *supra*, 251 U.S. 57; *Schroeder v. City of New York*, *supra*, 371 U.S. 108. Both of those cases, not coincidentally, arise in the condemnation context which is *sui generis*, i.e. since the "taking" itself is a legislative function, it is not subject to challenge.[3] Under the Fifth Amendment, the state has the unquestioned power to take "private property ...for public use." There is no postdeprivation "remedy," in the traditional sense, i.e., the claimant is not required to prove his right to compensation. Rather, the issue is simply how much compensation the State is obliged to pay. On that issue, the claimant is entitled to notice and an opportunity to be heard prior to a final determination.

> But it is essential to due process that the mode of determining the compensation be such as to afford the owner an opportunity to be heard.

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[3] See *Bragg*, 251 U.S. at 58. The taking of private property for the public use is a legislative question "and a hearing thereon is not essential to due process in the sense of the Fourteenth Amendment."

> Among several admissible modes is that of causing the amount to be assessed by viewers, subject to an appeal to a court carrying with it a right to have the matter determined upon a full trial. [Citations omitted] And where this mode is adopted due process does not require that a hearing before the viewers be afforded, but is satisfied by the full hearing that may be obtained by exercising the right to appeal. [Citations omitted.]
>
> . . .
>
> An opportunity to have such a hearing, before the compensation is finally determined, and when the right thereto can be effectively asserted and protected, satisfies the demand of due process.

Bragg, 251 U.S. at 59, 60-61.

In both *Bragg* and *Schroeder*, the notice required by due process was of the commencement of a finite period within which the claimants were required to assert their rights. Failure to assert those rights within the time periods resulted in the automatic loss of the rights. In *Bragg*, the right was to obtain a final determination of compensation by the circuit court. [4] In *Schroeder*, the

[4] In *Bragg*, the statute provided for notice of the supervisors' non-final decision regarding compensation either by the claimant's presence when the decision was made or by written notification from the clerk. A statute of general application provided a 30 day period for appealing decisions of the supervisors to the circuit court, a court of general jurisdiction, for review de novo. Personal notice of the supervisors' decision which started the clock running on the 30 day statute of limitations was held sufficient to satisfy due process. The entity was not required to also provide notice of the 30 day statute of limitations nor of the procedures necessary to invoke the right of appeal.

right was to make a claim which would result in a final determination of compensation by the city.[5] The requirement of notice in *Bragg* and *Schroeder* preceded any final adjudication and is consistent with this Court's other holdings imposing a notice requirement for proceedings which are to be accorded finality.

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.

[5] The *Schroeder* case involved a city's condemnation procedures relative to its diversion of a portion of the Neversink River. The statute found violative of due process in *Schroeder* did not require personal notice. Instead, it required publication and the posting of notices in conspicuous places in the vicinity of the real estate to be taken. Unlike *Bragg*, the statute in *Schroeder* required the land owner to file a claim with the city and all claims were barred if not filed within three years of notice. The statute did not provide for a preliminary determination by the city regarding the amount of compensation. The determination which flowed from the original claim was final.

The claimant in *Schroeder* was never provided personal notice and the consequences of the diversion of the rive were not such that it would be apparent that the city had diverted the river. The property owner failed to make a claim within three years of the constructive notice and her claim for compensation was barred by the statute of limitations. In finding that the statute in question violated due process, this Court held that the city was obligated to at least make a good faith effort to provide personal notice to the property owner, whose name and address were easily ascertainable, that the city had diverted the river and that the appellant had a right to be heard on a claim for compensation.

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950). Whether a hearing for final adjudication of a right is already set or some action by the claimant is necessary to avoid the loss of a right by default, the principle is the same.

> 'The fundamental of due process of law is the opportunity to be heard.' *Grannis v. Ordean*, 234 U.S.385, 394, 34 S.Ct. 779, 783, 58 L.Ed. 1363. This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest.

Mullane, 339 U.S. at 314.

Bragg and *Schroeder* have little application to the instant case. Neither case involved a "taking" protected under the Fourteenth Amendment. Neither case imposes under the Due Process Clause an obligation to advise a potential claimant of the procedures necessary to invoke or protect a property right. In other words, the notice required by due process, which was found adequate in *Bragg* and inadequate in *Schroeder*, was not notice of the law pertinent to condemnation proceedings. Rather, the required notice was of the pendency of a final proceeding regarding compensation. *Bragg* and *Schroeder* simply stand for the proposition that notice is required if failure to provide it will cause the potential claimant to lose the opportunity to be heard at a final adjudication of a protected property right. As such, those cases are predeprivation in nature. In other words, because the State's power to take property for public use is subject only to the obligation under the Fifth Amendment to provide "just compensation," without unreasonable delay, the notice given in both cases actually preceded a "final" determination as to compensation.

Respondents in this case were not faced with the prospect of a final determination of their property rights in the absence of some affirmative act on their part. There was no statute of limitations which had begun to run. Nor is there anything in the record to suggest the existence of a pending hearing where respondents' property rights would be finally adjudicated. Finally, even if there had been a pending hearing or statute of limitations, respondents were provided more than the minimal notice called for in *Bragg* and *Schroeder*.

II. IF THIS COURT DETERMINES THAT SOME FORM OF "NOTICE" IS REQUIRED IN POST DEPRIVATION CASES UNDER THE DUE PROCESS CLAUSE, THE "NOTICE" REQUIREMENT IS SATISFIED WHEN LAW ENFORCEMENT OFFICERS GIVE INDIVIDUALIZED NOTICE THAT PROPERTY HAS BEEN SEIZED

A. Respondents' Argument That They Would Have Been Able To Invoke The Process If They Had Been Given The Search Warrant Number Is Factually Unsupported And Legally Flawed

Respondents offer a variety of reasons for why they were unable to invoke the remedies available to retrieve their property: they were not provided with "key information about the seizure to access the procedure" (Resp. Brief at 8); they were not provided with "basic information to identify the property" (Resp. Brief at 8); they were not provided with "notice of the identification of the procedure" (Resp. Brief at 11); Judge Oki was on vacation; the postdeprivation remedy, although it was adequate, was not "meaningful" (Resp. Brief at 9); the criminal case was not filed until February 9, 1994.[6] All of

[6] Contrary to respondents' assertion, the criminal case was

these purported reasons are factually and legally insufficient to support respondents' contention that the notice provided by the City was constitutionally inadequate.

Respondents' contention that the notice denied them "basic information" necessary to obtain return of their property contravenes this Court's prior decisions wherein it was held that a state remedy is not inadequate simply because recovery might be difficult, time-consuming, speculative, or uncertain. *See*, *Parratt v. Taylor*, *supra*, 451 U.S. at 543-44 and *Hudson v. Palmer*, *supra*, 468 U.S. at 535. Moreover, this Court has repeatedly rejected the argument that a state remedy is inadequate simply because claimants are not aware of the fact that the remedy exists. Respondents concede that in the *Parratt-Hudson* line of cases where there is no need for predeprivation notice and a hearing, due process is satisfied only if a meaningful postdeprivation remedy is available. (Resp. Brief at 9.) However, respondents err in concluding that by merely providing notice of the seizure of property itself, the City "deprived Respondents of the information necessary to implement the procedure for return of property and, therefore, rendered the process meaningless." (Resp. Brief at 9.)

In essence, respondents urge this Court to conclude from the fact that they failed to invoke the process that the process was meaningless. According to respondents, if only they were provided with a bit more information, such as a search warrant number, a court file number, and a bit of guidance on the necessity of a written motion, the respondents would have been

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filed in the Municipal Court on July 9, 1993. The docket from the Citrus Municipal Court clearly shows that a criminal case complaint in the matter entitled *The People of the State of California v. Marcus Edward Marsh*, Case Number KAO18341, was filed on July 9, 1993. If judicial notice is taken, it should reflect the correct date.

successful in obtaining the return of their property. In urging this Court to speculate at this conclusion, however, respondents ignore the fact that the decision below also found the mandamus remedy to be adequate. (Pet. App. 17.) A petition for writ of mandamus is an original proceeding. *Wenzler v. Municipal Court*, 235 Cal.App.2d 128, 132 (1965). A writ of mandamus compels a public officer to perform a duty of the office. Cal. Code of Civ. Proc. §§ 1084, 1085.

Assuming, arguendo, that the search warrant number in the instant case was necessary to invoke California Penal Code § 1536, there is no basis for concluding that respondents could not have proceeded with a petition for writ of mandamus. Respondents were provided with a list of the property seized, the date it was taken, the police agency with custody, and the name and location of the judge whose order was necessary to obtain a release of the property. The writ would seek an order compelling Judge Oki to release the money and the gun in the custody of the West Covina Police Department. *Stern v. Superior Court*, 76 Cal.App.2d 772 (1946). No existing case number would be necessary to bring the action. Respondents had everything they needed to seek a writ of mandamus. Why, then, was the notice inadequate?

The fact is that respondents' alleged ignorance regarding the search warrant number was not an actual impediment, but rather it was an excuse. If respondents were truly motivated to invoke the process for the return of the money, and if the only thing that was preventing them from getting it back was the search warrant number and "basic information" regarding the legal procedures, as they now purport, it seems odd that they did nothing to obtain a return of the property even after they had the search warrant number and a lawyer. Respondents do not address this point in their brief. The unexplained lack of effort by respondents in obtaining a return of the property

emphasizes the folly inherent in the Ninth Circuit's method for determining the adequacy of notice. One cannot reliably judge the adequacy of notice based upon the success or lack thereof by a civil plaintiff. The fact that a Section 1983 plaintiff is allegedly unsuccessful in obtaining the release of seized property may say more about the motivation of the plaintiff than about the adequacy of the notice.

B. Contrary To Respondents' Speculation, Providing Accurate And Complete Information Regarding Potential Legal Remedies Is By No Means Simple

Respondents characterize as "slight" the additional burden placed upon law enforcement to provide notice of the applicable procedures to be employed in obtaining the return of seized property. This gross mischaracterization fails to take into account the information known to the officers at the time the property is seized (or lack thereof) and its relation to the various postdeprivation remedies. A variety of California laws set forth various procedures to be employed when one seeks the return of property seized pursuant to a search warrant. See Cal. Penal Code §§ 1536, 1538.5, 1539 and 1540. The procedures vary depending upon the nature and status of the property seized, the status of the owner of the property, and the nature and status of the criminal proceedings (if any) relating to the seized property. For instance, California Penal Code § 1538.5 sets forth a laundry list of procedures to be followed by a criminal defendant in seeking a return of seized property. It lists five separate grounds for seeking an order returning property. Cal. Penal Code § 1538.5(a)(2). The procedures differ depending on various factors including whether the charged crime is a misdemeanor or felony, whether the charges are initiated through a grand jury proceeding or preliminary hearing and whether the People appeal an order granting the motion.

The procedures applicable to non-criminal defendants are numerous as well. If the owner of the property is not charged with an offense, he may move under Cal. Penal Code § 1540 for a return of the property "[i]f it appears that the property taken is not the same as that described in the warrant, or that there is no probable cause for believing the existence of the grounds on which the warrant was issued, . . ." California Penal Code § 1540. If, however, the property was lawfully seized, as in the instant case, the relevant procedure is governed by California Penal Code § 1536.[7] This does not mean, however, that the owner of the property is automatically entitled to its return since it could still be evidence of a crime necessary for a criminal proceeding. See *People v. Von Villas*, 10 Cal.App.4th 201, 239 (1992) ("Obviously the determination as to whether evidence is 'material' or not cannot be made prior to or during a search pursuant to a search warrant."). If the evidence is in fact used in a criminal proceeding, the procedures for disposing of those exhibits are set forth in California Penal Code §§ 1417, et seq. In addition, a mandamus proceeding is an entirely different remedy, with its own procedures. *Stern v. Superior Court*, 76 Cal.App.2d 772 (1946).

The foregoing is in no way intended to be a complete articulation of the various scenarios which will determine the appropriate procedures for obtaining the return of seized property. What it does demonstrate, however, is that the "appropriate procedure" depends upon a number of factors which are unknown and undeterminable at the time the property is seized. When

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[7] Respondents repeatedly assert in their brief that their property was unlawfully or mistakenly seized. Neither assertion is accurate. The district court specifically found that there was probable cause to seize the property and that the seizure was lawful. (J.A. 57.)

the property is seized, the officer executing the warrant will have no way of knowing whether the owner of the property will be criminally prosecuted. Nor will he or she know whether the seized property will actually be used in a criminal proceeding, or whether the criminal proceeding will be a felony or misdemeanor proceeding. Assuming the owner of the property is not charged with a crime, the executing officer will have no way of knowing whether the seized property will nonetheless be used in a criminal proceeding. Nor will he or she know whether the owner of the property will claim that the warrant was not supported by probable cause or that the property was not that described in the warrant. Consequently, a notice which would encompass every possible scenario would be impossibly complex and, therefore, relatively meaningless.[8]

In short, the burden imposed by the Ninth Circuit's notice requirement is anything but slight. It is complex, unworkable and unrealistic. Furthermore, it demonstrates the wisdom of this Court's prior decisions establishing the principle that once an individual has been given notice that his property is subject to some governmental action, the published statute at issue supplies adequate notice of the procedure for challenging the deprivation of property. *North Laramie Land Co. v. Hoffman*, 268 U.S. 276, 280 (1925); *Reetz v. Michigan*, 188 U.S. 505, 509 (1903); *Anderson Nat'l Bank v. Luckett*, 321 U.S. 233, 237 (1944).

In the event that this Court determines that some form of "notice" is required under the Due Process Clause in cases where a hearing prior to the deprivation is not necessary, it should be limited to notice by law enforcement officers that property has been seized pursuant to a court-issued warrant. The information left

[8] The United States makes the same point with regard to federal warrants at pages 20 and 21 of its brief.

at the respondents' home in this case provided all the notice that was required for Fourteenth Amendment purposes. A motivated individual could have obtained an order for the return of his or her property with the information provided by the City.

Therefore, under either a Fourteenth Amendment or Fourth Amendment analysis, the notice provided by the City, which is virtually identical to the notice provided by the United States under Rule 41(d), was constitutionally adequate.

CONCLUSION

For all of the foregoing reasons, as well as the reasons set forth in the City's Brief on the Merits, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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